Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/08441/2015**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reason Promulgated**
On 4 April 2016	**On 17 May 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR KAHIN ABDURAHMAN

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss C Warren (Counsel)
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appellant's appeal to the Upper Tribunal against a decision of the First-tier Tribunal (Judge M J H Wilson hereinafter "the judge") promulgated on 5 November 2015, dismissing his appeal against the respondent's decision of 15 May 2015 to refuse to grant asylum or

any other form of international protection. I have decided, for the reasons set out below, to set aside the judge's decision (whilst not accepting all the arguments advanced on behalf of the appellant to the Upper Tribunal) and to remit so that matters can be considered afresh by the First-tier Tribunal and so that the decision may be remade.

2. The appellant is, it now seems, to be accepted a national of Somalia who was born on 1 January 1982. He entered the UK on 31 December 2005 at Heathrow Airport in possession of a Djibouti passport which did not belong to him. He was detained upon arrival and it is recorded that his claim for asylum was made on 2 January 2006. As to the matters underpinning his asylum claim, he said that he is a member of a Somalian minority clan the Bandhabow and that he is from Mogadishu in Somalia. He also said that he and his family had suffered ill-treatment at the hands of majority clan members, that a number of his family members had been killed and that he had left the country in 2001, living illegally in other countries including Djibouti, prior to coming to the UK.

3. The respondent did not, it is fair to say, deal with the asylum claim promptly. There appears to have been some errors in the decision making process which it is not necessary for me to revisit in this determination but, eventually, the respondent made the above decision which forms the subject of this appeal. In so doing, the respondent rejected, as not credible, the appellant's claims concerning previous ill-treatment in Somalia. The respondent thought that, in any event, given changes which had taken place in Somalia and, in particular in Mogadishu, the appellant would not now face any risk upon return. It was asserted that Al Shabab had withdrawn from Mogadishu and it was suggested that general living conditions there had improved and that there was no longer a difficulty with clan based persecution. It could not be said, with respect to humanitarian protection, that the conditions set out in Article 15(c) of the Qualification Directive existed. Nor was the appellant likely to face conditions which would breach Article 3 of the European Convention on Human Rights (ECHR). As to Article 8, the respondent thought that none of what might be described as the Article 8 related Immigration Rules applied and that there were no exceptional circumstances which could justify a grant of leave to remain on Article 8 grounds outside the rules.

4. The appellant's appeal was heard on 29 October 2015. Both parties were represented. He gave oral evidence as did two witnesses called on his behalf, the witness evidence relating only to the issue of clan membership. It is possible that there was some misunderstanding on the part of the judge as to precisely what was being contended on behalf of the appellant. Ms Warren, who did not represent the appellant before the judge, told me that it was not argued at all that the appellant was entitled to asylum although the judge appeared to think that it was. That may have been in consequence of the way in which matters were articulated to him but I do not know. In any event, there was advanced on behalf of the appellant an argument based upon what is said in the judgment of the Court of Appeal in ***Secretary of State for the Home Department v R(S)* [2007] EWCA Civ 546** to the effect that he should have been granted indefinite leave to remain on the basis of the delay in his asylum claim being processed. A particular point which was made in that context was that had the asylum claim been dealt with promptly then so long as it was accepted that the appellant is a member of a minority clan, (which the judge did appear to accept) he would probably have been granted asylum without any real difficulty. It was further contended that the appeal should succeed on humanitarian protection grounds and under Article 3 because of the general conditions he would face upon return to Mogadishu and that since he would not (it was asserted) be able to draw upon support from family and friends he would end up in an IDP camp. The Article 8 arguments, in looking at a letter written by Bradford Law Centre on 12 October 2015 which the Centre had said should be treated as a skeleton argument, seems to have been based upon the difficulty in removing persons from the United Kingdom to Somalia though, of course, there were

also considerations regarding private life based upon his relatively long-term residence in the UK. There was also a contention that the respondent ought to have considered granting leave under the terms of its policy as set out in Chapter 53 of its Enforcement Instructions and Guidance.

5. The judge, in a careful determination, distinguished between the circumstances obtaining in this appeal and those relating to one of the parties in ***R(S)***. In particular, he noted that in ***R(S)*** it had been accepted by the Court of Appeal that they were dealing with not simply a case of delay but of a deliberate and unlawful decision taken by the Home Office in 2001 to postpone the consideration of various asylum claims in order to enable them to prioritise other asylum claims and that that, in the circumstances, had amounted to conspicuous unfairness and an abuse of power. As to risk on return, the judge (although it seems that this was not argued before him in any event) found that there was no risk stemming from Al Shabab. Nor, in the context of humanitarian protection, was there a risk based upon Article 15(c) bearing in mind what had been said by the Upper Tribunal in ***MOJ and Others (return to Mogadishu) Somalia CG 2014 UKUT 00442 (IAC)***. As to any risk of the appellant having to live in an IDP camp upon return to Somalia in circumstances which would amount to a breach of Article 3, the judge concluded that the appellant had failed to show that he would have a lack of support such that he would end up in such a camp facing such conditions though he did not appear to disagree with the proposition that if he did find himself in an IDP camp the conditions he would face, as suggested in ***MOJ***, would probably breach Article 3. Concerning that matter he said this:

> " 20. I find that the appellant failed to show that he had no family living in Somalia. For example he claimed in his screening interview record in 2006 that both his parents were dead, yet he submitted no evidence of this even though he stated at the hearing that he was born and brought up in Mogadishu and even though he has had almost 10 years in which to produce evidence of his parents respective deaths. I find that he failed to show why it was impossible to obtain such evidence. I furthermore note that he claimed that his brother's whereabouts, Jamal, was unknown but then stated that he was not in Somalia, a claim that in the absence of an explanation I find somewhat contradictory. Additionally I note from his screening interview that he stated he had siblings living in Saudi Arabia, including his sister, Sharifa, with whom he was in contact and who had financially supported him. However I note from his most recent witness statement that he now claims that she died. He failed to state when this allegedly occurred and, as with the alleged deaths of his parents, he submitted no evidence in support despite having been in contact with his brother-in-law, with whom he apparently is now no longer in contact. Now, he claims, he is 'unaware' of any relatives living in Somalia and would therefore have nowhere to go and no access to money."

6. The judge then, without making it absolutely clear, seemed to accept, at least by implication, that the appellant is of Bandhabow ethnicity but thought that this would not give rise to any difficulties for him and, as I understand it, that it might even lead to his being able to obtain support from his other clan members upon return. He also thought that the appellant had failed to show he would be unable to obtain financial support from others who had assisted him in the past. Finally, as to that, he also thought that, given that he had been able to obtain work in the UK and elsewhere, the appellant would be able to earn a living in Mogadishu or somewhere else in Somalia.

7. As to Article 8, the judge conducted an assessment outside the rules, it seemingly not having been contended before him that there was any viable argument based on Article 8 within the rules, and he followed the five fold test set out in ***Razqar v Secretary of State for the Home Department 2004 UKHL 27***. He noted that the appellant had been in the UK for in excess of nine years but said there was no evidence to suggest that he has established family life in the UK and that although he will enjoy a private life here there was no evidence before him "as to how or in what way it is

constituted". He referred to section 117B of the Nationality, Immigration and Asylum Act 2002 which he observed obliged him to attach little weight to private life established when a claimant's immigration status was precarious and, in light of all of that, he concluded that Article 8 was not, in fact, engaged at all so that the arguments failed at the second stage of the ***Razgar*** process. He added that, in any event, even if he was wrong about that, he would have concluded that any interference with Article 8 rights was proportionate.

8. There followed an application for permission to appeal to the Upper Tribunal. Permission was granted by a judge of the First-tier Tribunal despite his describing the grounds as being "over-wordy". The salient part of the grant reads as follows:

> "In particular, I consider it arguable that in considering the appellant Article 8 case, the judge has not sufficiently factored in the very long delay by the respondent in making a decision on the appellant's claim for asylum and, as per paragraph 3 of the grounds, given the circumstances that have prevailed in Somalia over recent years it may have been unreasonable for the judge to expect the appellant to produce corroborating evidence in relation to the claimed deaths of his parents (see the judge's paragraph 20)."

9. There was then a hearing before the Upper Tribunal (before me) so that the question of whether the judge had erred in law and, if so, what should flow from that could be considered. Representation was as stated above and I heard oral submissions from each representative. I have taken all of what was said into account.

10. As indicated above, I have decided to set the decision aside. As to the consideration under Article 3, it does seem to me, as noted in the grant of permission, that the judge did not properly consider the difficulties that there might well have been in obtaining any corroborative evidence of the claimed death of the appellant's parents. As I understand it, his account is that both must have died when he was very young. It is well known that there has been a breakdown of law and order in Somalia spanning a number of years which might have meant the obtaining of corroborative documentary evidence would simply not have been possible. There might well have been difficulties in tracing any witnesses who might be able to provide statements concerning the death of his parents. It does seem to me that, notwithstanding the point the judge makes to the effect that the appellant has had many years to try to obtain some evidence about all of this, the judge's approach has not taken account of what would seem to be obvious difficulties in seeking to obtain such evidence. Further, although the judge detected inconsistency in the appellant having said that his brother's whereabouts were unknown but that he was not in Somalia, I do not necessarily detect any such inconsistency myself. If what the appellant was seeking to say was that he does not believe his brother is in Somalia but he does not actually know where, outside of Somalia he is, then that would not seem to me to be inconsistent or contradictory. The judge was not obliged to accept the appellant's assertions that he would have no family or other support available to him upon return to Mogadishu but such a conclusion had to be based upon a proper consideration of the evidence. I do conclude, therefore, that in this respect, and despite his commendably thorough approach, the judge did err and that his error was material because had he decided the appellant would not have sufficient support such that he would end up in an IDP camp he would probably, in light of the prevailing case law and in particular ***MOJ***, have concluded that this would amount to a breach of Article 3.

11. Turning to Article 8, the written grounds criticised the judge for failing to carry out "a proper balancing operation", and sought to stress the appellant's long period of residence in the UK and the fact that he has worked here. It does seem to me, though, that little in the way of written or oral evidence was presented to the judge as to the nature, quality and substance of the appellant's

private life, a point the judge himself rightly made. For example, there does not appear to be anything about any strands or aspects of his private life, at least in any proper detail at all, in the appellant's most recent witness statement, that of 2 March 2015. Nevertheless, as the judge who granted permission to appeal noted, there had been a very long delay in the processing by the respondent of the appellant's asylum claim and such, in my judgment, had clear relevance, whilst not being decisive of itself, to a consideration of proportionality. I appreciate that the judge found that he was not actually required to form a view as to proportionality (although he did go on to do so) because Article 8 was not engaged but that seems to me to have been a particularly bold conclusion to have reached bearing in mind a period of residence in the UK of such length. Without more I would regard that particular finding as being unsustainable. So, the delay and any consequences that there were of it, such as the appellant setting down roots in the UK as a result of it or the implication that the respondent did not consider the interest of immigration control to be particularly compelling in this case, had to be properly considered and addressed in a proportionality balancing exercise. That was not done here. So, there was also legal error in the way the judge dealt with the Article 8 arguments.

12. It will be noted I have not found what I consider to be identifiable legal error with respect to the various other points which have been taken on behalf of the appellant. In particular, I do not consider some of the criticisms in the written grounds, and indeed the way some of them were expressed, to be entirely helpful. Nevertheless, since I have accepted there has been error with respect to the international protection aspect and the Article 8 aspect I have decided to set aside the decision in its entirety. I have decided to remit to the First-tier Tribunal bearing in mind that further fact-finding will be necessary. The appellant will be free, at the next hearing, to pursue whatever arguments he wishes. I have set out some directions which will hopefully assist the First-tier Tribunal in its task. Given the current state of the documentation on file it will be seen I have directed the filing of a consolidated bundle which I feel will be of assistance to all concerned.

Directions to the First-tier Tribunal

A. The decision of the First-tier Tribunal (Judge M J H Wilson) of 5 November 2015 is set aside. Nothing is preserved. The appeal is remitted to the First-tier Tribunal to be decided by a judge of that tribunal other than Judge M J H Wilson.

B. The remitted appeal will be heard at the Bradford Hearing Centre and the time estimate shall be three hours. A Somali speaking interpreter will be required.

C. The appellant's representatives shall send to the First-tier Tribunal (and send a copy to the respondent) a consolidated bundle of all documents which are to be relied upon at the forthcoming hearing even if such documentation has been previously sent to either the First-tier Tribunal or the Upper Tribunal. That bundle should include any additional documents not previously filed but which are to be relied upon at the next hearing such as any further witness statements or further background country material. The bundle shall be indexed and paginated and shall, if appropriate, contain a schedule of essential reading. That bundle should reach the First-tier Tribunal and the respondent at least 10 working days prior to the date which will be fixed for the hearing.

D. Should the respondent wish to file any additional documents she too must observe the requirements regarding service, timing and format which have been set out in direction C above.

Decision

The decision of the First-tier Tribunal involved the making of an error of law. That decision is, in consequence, set aside. The appeal is remitted to the First-tier Tribunal.

Anonymity

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

As no fee is paid or payable there can be no fee award.

Signed Date

Upper Tribunal Judge Hemingway